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In the

Supreme Court of the United States

KATHLEEN SEBELIUS, *et al.*,
Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP, *et al.*,
Petitioners,

v.

KATHLEEN SEBELIUS, *et al.*,
Respondents.

On Writs of Certiorari to the U.S. Courts of Appeals for the Tenth and Third Circuits

BRIEF OF THE C12 GROUP, LLC, AS *AMICUS CURIAE* SUPPORTING THE NON-GOVERNMENTAL PARTIES

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INTEREST OF THE *AMICUS*[1]

The C12 Group, LLC, ("C12") is a North Carolina leadership-development company whose purpose is to counsel, train, and encourage Christian business leaders across North America who are seeking to run their businesses with excellence and in accordance with their Christian religious faith. Toward this end, the C12 Group facilitates monthly peer executive roundtable meetings that discuss strategies for running successful businesses and strategies for applying Christian principles to these businesses. Participants in these roundtables pay a fee to become "members" of C12 Group, and members attend both a monthly roundtable and a monthly one-on-one Christian counseling session focused on prayer, accountability, and encouragement.

Although C12 is legally organized as a for-profit business entity, it considers itself to be equally a business *and* a ministry—"a business with a heart of a ministry."[2] And one of the primary purposes of the company is to teach and encourage members to view their businesses the same way. Indeed, although the

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[1] Counsel for all parties have consented to the filing of *amicus* briefs, and their consents are reflected on the docket. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

[2] Frequently Asked Questions, C12 Group, http://www.c12group.com/frequently-asked-questions/ (last visited Jan. 24, 2014).

vast majority of C12's more than 1,300 members are the leaders of *for-profit* entities, they view their companies as their primary Christian ministries—just as the pastor of a church might view his church as his primary ministry.[3]

Ninety-five percent of the C12 Group's clients lead or own family businesses with workforces ranging from ten to thousands. A relatively small number lead more broadly-held partnerships or public companies. C12's clients are generally Bible-believing, evangelical Christians who view their work as God's primary calling to ministry through their lives. They view themselves as tending to God's companies as stewards and ambassadors, and generally operate according to core principles informed by their Christian faith. The overwhelming majority of the C12 Group's members object to the same Department of Health and Human Services ("HHS")-required pharmaceuticals and devices as Hobby Lobby, and they view paying for these pharmaceuticals and devices as violating their Christian consciences.

C12 particularly objects to the dichotomy, proposed in the Solicitor General's brief, between for-profit and not-for-profit religious entities. C12 and its members reject this dualistic worldview and believe that for-profit companies can be every bit as much a religious ministry as non-profit companies.

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[3] Buck Jacobs, *A Light Shines Bright in Babylon: A Handbook for Christian Owners and CEOs* 1 (Don Barefoot, ed., 2013).

INTRODUCTION AND SUMMARY OF ARGUMENT

The key issue in this case is whether a for-profit entity qualifies as a "person" under the Religious Freedom Restoration Act ("RFRA"), which requires the federal government to satisfy strict scrutiny before imposing a substantial burden on "a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). The text of the statute plainly suggests that the answer is yes—the U.S. Code defines "person" to include corporations. 1 U.S.C. § 1. The Solicitor General has nevertheless asked this Court to hold that the statute protects "religious non-profits" but not for-profit entities. This argument is consistent with the government's argument in the district court, where the Justice Department suggested that Hobby Lobby was a "secular" corporation because it was organized as a for-profit, and argued that "secular" corporations are not covered by RFRA.

The key premise behind the Solicitor General's argument is that "[f]or-profit corporations are different from religious non-profits in that they use labor *to make a profit*, rather than to perpetuate a religious values-based mission." Gov't *Hobby Lobby* Br. 19 (citation and internal quotation omitted). The C12 Group files this brief to explain why it is wrong to view profit-seeking and religious purpose as mutually exclusive.

1. RFRA explicitly protects the rights of "a person" to freely exercise religion, and the Dictionary Act defines "person" to include corporations. That should end the analysis. The Solicitor General nevertheless suggests, based on RFRA's legislative history and this Court's pre-RFRA jurisprudence,

that Congress could not possibly have intended to grant free-exercise rights to for-profit corporations.[4] This argument is incorrect. As explained below, the first draft of RFRA explicitly limited RFRA to natural persons and religious entities—precisely as the Solicitor General asks the Court to do here. Congress, however, chose to delete this limitation and extend the protections of RFRA to every "person" as defined by the Dictionary Act. If Congress had intended to limit RFRA protections to religious corporations as suggested by the Solicitor General, it could have and would have done so.

The Solicitor General's argument is similarly inconsistent with this Court's constitutional jurisprudence more generally. As explained below, this Court has typically applied constitutional rights to corporations without distinguishing between for-profit and non-profit corporations. And while not all constitutional rights apply to corporations, the general rule is that corporations are entitled to constitutional protections unless those rights are "purely personal." In that case, the protection does not apply to for-profit *or* non-profit corporations. The

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[4] The Solicitor General also appears to argue that, even if the word "person" in RFRA technically is defined to include for-profit corporations, those for-profit corporations are nevertheless excluded from RFRA because the Court's jurisprudence shows that for-profit corporations cannot, as a matter of core constitutional law, exercise religion. This argument is similar to the Solicitor General's argument that Congress could not possibly have intended to include for-profit corporations within the scope of RFRA, and it fails for the same reasons.

government's proposal is not consistent with these principles.

2. Putting aside the legislative history and the Court's prior jurisprudence, the government's argument simply doesn't make much sense. The government suggests that corporations deserve free-exercise rights only if they "perpetuate a religious values-based mission" and then assumes that for-profit entities cannot "perpetuate a religious values-based mission." Gov't *Hobby Lobby* Br. 19. This assumption is both factually and legally incorrect. In fact, C12's "for-profit" members view themselves as having a religious values-based mission even while leading profitable and growing enterprises that serve others well.

The distinction between for-profit and non-profit entities is largely a matter of state law and has nothing to do with whether an entity is capable of perpetuating a "religious" mission. The primary difference between a for-profit and a not-for-profit has to do with what the entity is permitted to do with its net income. While a non-profit must spend that net income to further its corporate purpose or reinvest the income in the organization, a for-profit entity may also distribute the net income to shareholders. Both for-profits and non-profits can and do engage in religious or charitable activities, and as explained below, the academic literature has recognized that for-profit charities can have advantages over non-profits. This recognition has led to the creation of new types of for-profit entities whose primary purpose is to enhance the public good rather than to maximize profits. Among these new entities are "benefit corporations"—which can now be

formed in more than a dozen states—and low-profit limited liability companies ("LC3s").

But for-profit companies are not limited to charitable or philanthropic purposes. In many cases, for-profit companies are formed and operated for explicitly religious purposes. Indeed, as explained below, the C12 Group and its members believe that the life of a businessperson is a special religious calling and that God calls them to run their businesses in accordance with Biblical principles. For this reason, while C12 and its members view their businesses as separate and distinct from a church, they view the underlying purpose of both institutions as the same. Not surprisingly, therefore, C12 and its members perpetuate "a religious values-based mission" every bit as much as the not-for-profit religious corporations that the Solicitor General concedes are protected by RFRA.

3. The Solicitor General also maintains that the "fundamental tenets of American corporation law" prevent courts from imputing the views of individuals who own and control corporations to the corporations themselves. Gov't *Hobby Lobby* Br. 23. This is wrong both as a matter of logic and of law. The Court has long held that corporations' acts and intentions derive from their owners or agents—not only in areas like criminal law, but even specifically for free-exercise rights. And indeed, it could not be otherwise, as corporations' unique legal existence does not change that they are ultimately collectives of real human beings.

The experience of C12's members reflects the practical reality that for-profit corporations regularly take on the religious actions and intentions of the

people who control and represent them. And importantly, these "for-profit" corporations regularly elect to follow religious dictates at the expense of maximizing their profit-making opportunities. To assert that this is not the exercise of religion is to advocate for a rule of law that not only contravenes well-settled precedent, but denies how the world actually operates.

ARGUMENT

I. THE GOVERNMENT'S PROPOSED DISTINCTION BETWEEN FOR-PROFIT AND NOT-FOR-PROFIT CORPORATIONS HAS NO BASIS IN THE STATUTE OR IN THIS COURT'S JURISPRUDENCE.

A. The Plain Text of RFRA Does Not Distinguish Between For-Profit and Not-For-Profit Entities.

The government's core argument in this case is that the Religious Freedom Restoration Act applies only to individuals and religious not-for-profit entities, and not to for-profit corporations. The Tenth Circuit correctly rejected this argument as inconsistent with the text of RFRA. RFRA prohibits the federal government from imposing a substantial burden on "a person's exercise of religion" unless the government can demonstrate that it meets the requirements of strict scrutiny. 42 U.S.C. § 2000bb-1(a). Because the statute does not explicitly define *person*, it implicitly incorporates the definition found in the Dictionary Act, which defines words in "any Act of Congress, unless the context indicates otherwise." 1 U.S.C. § 1. Under the Dictionary Act, a

person includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals" "unless the context indicates otherwise." *Id.* The Act does not purport to exclude for-profit corporations from this definition.

Because the definitions in the Dictionary Act apply "unless the context indicates otherwise," *id.*, one might expect the Solicitor General to argue that the context indicates otherwise. Notably, however, the Solicitor General does not do so, *see* Gov't *Hobby Lobby* Br. 22—and for good reason. For the purposes of the Dictionary Act, context has a "narrow" meaning. *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199 (1993). This Court has made clear that to determine whether the context of a statute "indicates otherwise," the Court should look only at "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." *Id.*; *accord Korte v. Sebelius*, 735 F.3d 654, 674 (7th Cir. 2013). "Review of other materials is not warranted." *Hubbard v. United States*, 514 U.S. 695, 701 (1995). Moreover, the Court should apply an alternate definition only when the ordinary definition "seems not to fit." *Rowland*, 506 U.S. at 200.

The Solicitor General does not and cannot point to any words in RFRA or any related statute suggesting that the normal definition of *person*—which includes for-profit corporations—"seems not to fit." Nothing in the text of RFRA or its surrounding statutes suggests that a for-profit corporation cannot or should not be able to exercise religion.

B. The Government's Proposed Distinction Between For-Profits and Not-for-Profits Is Inconsistent with RFRA's Legislative History and this Court's Constitutional Jurisprudence.

The government spends much of its brief discussing the legislative history of RFRA and the overall arc of this Court's First Amendment jurisprudence prior to *Employment Division Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Neither of these is statutory "context" that would permit this Court to deviate from the definition of *person* in 1 U.S.C. § 1. *Rowland*, 506 U.S. at 199. In any event, both of these interpretive tools actually undermine the government's case. As explained below, the legislative history suggests that Congress considered and *rejected* the narrow definition of *person* that the Solicitor General has advocated in his brief. Moreover, this Court has never distinguished for-profit and not-for-profit entities in determining whether a particular constitutional right applies to a corporation. Rather, as discussed below, the default rule is that rights guaranteed by the Constitution apply to individuals and corporations alike—regardless of the corporation's particular form under state law. The exception is constitutional rights that are "purely personal," which do not apply to corporations at all. The government cannot argue, however, that free-exercise rights are purely personal because it is well established that free-exercise rights apply to at least some corporations.

1. In Passing RFRA, Congress Rejected the Government's Narrow Definition of Person.

While failing to point to any statutory context, the Solicitor General relies on the legislative history of RFRA, suggesting that if Congress had intended for RFRA to apply to for-profit corporations, "there would surely have been some express mention of that intent in either the statutory text or in the legislative history." Gov't *Hobby Lobby* Br. 21. This is an odd argument because the government has not argued that RFRA is ambiguous, and it is generally inappropriate to consult the legislative history when the statutory text is unambiguous. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 186 (2004). It is equally odd because Congress made clear that it intended for RFRA to apply anytime "free exercise of religion is substantially burdened," 42 U.S.C. § 2000bb(b)(1), and did not purport to limit its application to a particular subset of persons.

In any event, the legislative history demonstrates that Congress actually rejected the definition of *person* that the government has asked this Court to adopt. The first draft of RFRA, which was introduced to the House of Representatives in July 1990, explicitly limited *person* in much the way the Solicitor General has proposed. That bill defined "person" to include "both natural persons and religious organizations, associations, or corporations." *See* H.R. 5377, 101st Cong. § 4(4) (2d Sess. 1990). Congress, however, ultimately decided to *delete* this narrow definition of *person* and adopted a version of RFRA that contained *no* definition of *person*.

This deletion is significant for at least three reasons. First, it shows that Congress knew how to define *person* in the limited way advocated by the Solicitor General. Second, it shows that Congress actually considered defining *person* in the limited way proposed by the Solicitor General. Finally, it shows that Congress opted not to do so, choosing instead to use the standard definition found at 1 U.S.C. § 1. This Court can and should presume that Congress was aware of the default definitions found in 1 U.S.C. § 1 and that by deleting the definition of *person* found in the original draft, Congress intended for the definition in 1 U.S.C. § 1 to apply. *Cf. Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988) (presuming that "Congress is knowledgeable about existing law pertinent to the legislation it enacts").

C. The Government's Proposal Is Inconsistent with the Court's First Amendment Jurisprudence and with Constitutional Law Generally.

The Solicitor General also relies on this Court's jurisprudence prior to *Employment Division v. Smith* for the idea that Congress could not possibly have intended to protect free-exercise rights of corporations. The government argues that, because no pre-*Smith* case explicitly held that for-profit corporations (as opposed to non-profit corporations) enjoy free-exercise rights,[5] Congress could not have

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[5] Of course, the Court *has* expressly held that individuals as business owners have free-exercise rights. *See United States v. Lee*, 455 U.S. 252 (1982); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion).

intended to protect these rights. Gov't *Hobby Lobby* Br. 16. The Solicitor General similarly maintains that the same body of law shows that for-profit corporations cannot (or at least do not), as a fundamental matter, exercise religion. *Id.* at 17. These arguments, however, get things backwards. As explained below, constitutional rights generally apply to corporations and individuals equally, and the government has not pointed out any case suggesting that for-profit corporations enjoy fewer constitutional rights than not-for-profit corporations. Thus, unless the Court had explicitly found that for-profit corporations cannot exercise religion, Congress would have had no reason to suspect that the Court might exclude for-profit corporations from the reach of RFRA. Nor should the precedent on the issue lead the Court to any conclusion other than that for-profit corporations can and do exercise religion.

1. Congress Expected Free-Exercise Rights to Apply to For-Profit Corporations Unless They Were Purely Personal.

Generally, constitutional rights apply to corporations. *See, e.g., Monell v. Dept. of Soc. Servs. of New York*, 436 U.S. 658, 687 (1978) ("by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis"). Corporations have First Amendment rights to political speech, *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 349, 354 (2010), and association, *Pacific Gas and Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 16 (1986). They are likewise accorded the Fourth Amendment

right to be free from unreasonable searches and seizures, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978), as well as the Fifth Amendment rights against double jeopardy, *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 565, 575 (1977), and takings, *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931). Corporations also enjoy the Sixth Amendment right to counsel, *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743 (3d Cir. 1979), as well as the Seventh Amendment right to a jury, *Ross v. Bernhard*, 396 U.S. 531, 532–33 (1970); *United States v. R.L. Polk & Co.*, 438 F.2d 377, 378-80 (6th Cir. 1971). The Court has also consistently held that "a corporation is a 'person' within the meaning of the equal protection and due process of law clauses." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936); *see also Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897) ("It is well settled that corporations are persons within the provisions of the fourteenth amendment of the constitution of the United States ... The rights and securities guarantied to persons by that instrument cannot be disregarded in respect to these artificial entities called 'corporations' any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations.").

The primary exception to this rule is for a class of constitutional rights that are "purely personal." As this Court explained in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978), corporations are denied constitutional rights only when the history of that right demonstrates it to be "purely personal" in nature. Applying this test, the *Belotti* Court accorded speech rights to corporations,

but contrasted that to its decision in *United States v. White*, 322 U.S. 694, 698–99 (1944), which denied to corporations the Fifth Amendment right against self-incrimination. In *White*, the Court found that the rationale for the protection against self-incrimination was to stop prosecutors from using torture or other "reprehensible" means to exact evidence from the person they were prosecuting. *Id.* Since it is impossible for a prosecutor to use forms of physical or psychological compulsion on a corporation, the right was found to be "purely personal," and did not apply to a corporation. In the case of free exercise, *Belotti* thus teaches that the Court should begin by assuming that the right applies to corporations, and then examine whether the right is so "purely personal" that an exception applies.

2. As the Government Implicitly Concedes, Free-Exercise Rights Are Not Purely Personal.

Following this path, even a cursory examination reveals that free-exercise rights are far from "purely personal." As Judge Cowan pointed out in his dissent in *Conestoga Wood Specialties Corp. v. Secretary of United States Department of Health & Human Services*, 724 F.3d 377, 400 (3d Cir. 2013), individuals exercising religion have "from time immemorial sought strength in numbers," and this Court has many times accorded free-exercise rights to groups of people organized as corporations. *Id.* at 399. The text of the free-exercise clause was itself modified before ratification to protect the "exercise of religion" rather than just "rights of conscience," thus "encompass[ing] the corporate or institutional

aspects of religious belief."[6] The modern legal corporate form indeed finds its seeds in Roman Catholic canon law, which first established the body of the church as a separate, fictional person.[7]

Even the government does not deny that religious rights can be exercised by a group of people associated in a corporation. Rather, the government seeks to rewrite the *Belotti* test to analyze *what type* of corporation can exercise religion. But the *Belotti* test is dichotomous: either all corporations are capable of acting on religion or none are. In no instance has the Court found that *some* corporations would enjoy a constitutional right while others would not, and there is no reason to think that Congress intended for it to do so in this case.

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[6] Michael W. McConnell, *The Origins & Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1490 (1990).

[7] *See* Francis Helminski, *Canon Law & Mystical Body: Religious Corporations in Minnesota*, 22 Hamline L. Rev. 689, 689 (1999) ("Churches are among the eldest of corporations."); Eric Enlow, *The Corporate Conception of the State & the Origins of Limited Constitutional Government*, 6 Wash. U. J. L. & Pol'y 1, 18 (2001) ("By the twelfth century, the Roman Catholic church was conceived in legal terms as a corporation by European civilians and canonists.").

II. THE GOVERNMENT'S PROPOSED DISTINCTION BETWEEN FOR-PROFIT AND NOT-FOR-PROFIT ENTITIES DOES NOT MAKE SENSE.

Although the government devotes much of its brief to describing the pre-*Smith* cases, its proposed distinction between for-profits and not-for-profits derives not from the cases but from its assumptions about the fundamental nature and purposes of for-profit companies. In the government's view, for-profit entities are fundamentally "different from religious non-profits" because their sole purpose is "simply to engage in commerce" and not to "perpetuate a religious values-based mission," as not-for-profits may do. Gov't *Hobby Lobby* Br. 19 (internal quotations omitted).

This statement is fundamentally wrong both as a matter of law and as a matter of fact. As a matter of law, a corporation's ability to perpetuate a "religious values-based mission" does not depend on whether the corporation is organized as a for-profit or not-for-profit under state law, nor does it depend on whether the corporation meets the requirements for tax exemption under Section 501(c)(3) of the Internal Revenue Code. As a factual matter, C12 and the companies owned and operated by its members (and those of several similar organizations across America) are compelling examples of for-profit corporations whose missions are substantially, or even primarily, religious. To deny these entities the protections of RFRA and the free-exercise clause would undermine RFRA's very purpose—to ensure that the government does not substantially burden

any person's exercise of religion without satisfying strict scrutiny.

A. For-Profit Corporations May Be Formed and Operated for Charitable or Philanthropic Purposes.

The primary difference between a for-profit and a not-for-profit entity has to do with the entity's ability to distribute profits. A for-profit corporation may distribute its profits as dividends to shareholders or as bonuses to employees. The "defining feature" of a non-profit firm, however, "is that it cannot distribute net revenue to any affiliated persons or employees, a restriction known as the 'nondistribution constraint.'"[8]

Notably, however, the nondistribution constraint does not prohibit non-profits from seeking primarily to earn a profit, nor does anything about the non-profit form force a non-profit to engage in primarily charitable or religious ends. For that reason, for-profit firms frequently "compete in the same market as nonprofits," and it is common to see both for-profit and not-for-profit hospitals, daycare centers, and publishers—to give just a few examples.[9] This fact has led some courts to recognize "the increasing irrelevance of the distinction between nonprofit and for-profit" form "for purposes of discovering the element of charity in their operations." *See, e.g.*, *County Bd. of Equalization of Utah Cnty. v. Intermountain Health Care, Inc.*, 709 P.2d 265, 271

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[8] Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 Va. L. Rev. 2017, 2018 (2007).

[9] *Id.* at 2024.

(Utah 1985) (discussing irrelevance in the context of hospitals).

Moreover, as a practical matter, nothing about the non-profit form forces a non-profit entity to further primarily a religious, charitable, or community-benefit mission, nor does the non-profit form necessarily prevent a non-profit from being operated for the profit of some person or group. For example, although the Green Bay Packers are organized as a non-profit corporation, the team earned a record $54.3-million profit in fiscal year 2013[10] and pays many of its players multi-million-dollar salaries, just as for-profit National Football League teams do.[11] Similarly, while both for-profit and not-for-profit hospitals can truly benefit the community, courts have found that some non-profit hospitals amount to little more than "physicians' cooperative[s]" operated "primarily for the benefit of the participating physicians." *Intermountain Health Care, Inc.*, 709 P.2d at 271. When that happens, hospital physicians "enjoy power and high income through their direct or indirect control over the nonprofit hospitals to which they bring their patients ... This model has also been called the 'exploitation hypothesis' because the physician 'income

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[10] Aaron Kuriloff, *NFL's Green Bay Packers Post Club-Record $54.3 Million Profit,* BLOOMBERG NEWS (Jul. 17, 2013, 12:01 AM) http://www.bloomberg.com/news/2013-07-16/nfl-s-green-bay-packers-post-club-record-54-3-million-profit.html.

[11] Green Bay Packers, FOX SPORTS, http://msn.foxsports.com/nfl/team/green-bay-packers/salary/67046?q=green-bay-packers (last visited Jan. 24, 2014).

maximizing' system is hidden behind the nonprofit façade of the hospital." *Id.* Similarly, others have argued that "many nonprofit hospitals operate as [mere] 'shelters' within which physicians operate profitable businesses, such as laboratories." *Id.*

At the same time, nothing about the for-profit form prevents a charitable or religious entity from organizing as a for-profit corporation. As the State of Oklahoma explained in its *amicus* brief in the Tenth Circuit, the Oklahoma General Corporation Act allows a for-profit corporation "to organize for 'any lawful purpose,' including religious purposes. The Act creates no distinction between those corporations who choose a lawful purpose that is religious in nature and those who choose a lawful purpose that is secular in nature." Brief of Oklahoma as *Amicus Curiae* in Support of Plaintiffs-Appellants and in Favor of Reversal at 2, *Hobby Lobby v. Sebelius,* No. 12-6294 (10th Cir. Feb. 19, 2013); *see also id.* at 5-7. Oklahoma law is not unique on this issue. *See, e.g.*, 8 Del. Code § 101(b) ("A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes . . ."); *id.* § 122 ("Every corporation created under this chapter shall have power to: . . . (9) Make donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof.").

While the idea of incorporating a religious or charitable organization as a for-profit corporation may initially sound counterintuitive, the academic literature has identified a number of advantages that for-profit charities enjoy over their not-for-profit counterparts. These include the unrestricted ability

to invest in for-profit businesses in pursuit of philanthropic goals, the ability to directly access the resources of a pre-existing for-profit entity, and the ability to engage in political activities that would be impermissible for at least a tax-exempt not-for-profit.[12] Some commentators have further suggested that organizing charitable organizations as for-profits would "improve the efficiency of services provided by nonprofit firms."[13]

While the pros and cons of for-profit charities can be debated, what is not debatable is the growing interest in using the for-profit philanthropic model. The most prominent example is Google, which has consolidated its philanthropic operations in a for-profit division known as "Google.org."[14] Although Google.org also works with Google's more traditional not-for-profit foundation—the Google Foundation—it was important for Google.org to be a for-profit organization because only the for-profit form gave

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[12] *See* Dana Brakman Reiser, *For-Profit Philanthropy*, 77 Fordham L. Rev. 2437, 2454-62 (2009) (discussing Google.org—Google's for-profit charitable arm).

[13] *See* Malani & Posner, *The Case for For-Profit Charities*, 93 Va. L. Rev. at 2022.

[14] *See* Reiser, *For-Profit Philanthropy*, 77 Fordham L. Rev. at 2438 (noting that "[t]he for-profit philanthropy structure distinguishes Google.org from the customary range of corporate philanthropic practice" and "also differentiates this model from philanthropy pursued in the traditional organizational form: a tax-exempt, nonprofit corporation."); Sheryl Sandberg, *About Google.org*, Google Official Blog (Oct. 11, 2005), http://googleblog.blogspot.com/2005/10/about-googleorg.html.

Google sufficient flexibility to pursue its intended philanthropic strategies.[15]

Many states have also recently passed laws allowing new hybrid corporate forms that explicitly combine aspects of for-profit and non-profit entities, reflecting the increased interest in facilitating the formation of profit-capable corporations that primarily serve charitable ends. These new corporate forms may not be strictly necessary for many socially minded companies. In closely held corporations like Hobby Lobby where all stakeholders agree on that purpose and are likely to continue to do so indefinitely, there is nothing to stop a garden-variety for-profit corporation from pursuing charitable or religious ends over profit. Similarly, in more widely held companies, where shareholder views and goals are more likely to fluctuate over time, an ordinary for-profit corporation can draft its bylaws to make clear that officers and directors are permitted to pursue a religious or charitable goal at the expense of profits.[16] Nevertheless, these new corporate forms fill an important practical gap: they allow would-be charitable entrepreneurs to achieve these goals without the expense of outside legal counsel and without feeling constrained to keep the corporation closely held.

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[15] Reiser, *For-Profit Philanthropy*, 77 Fordham L. Rev. at 2438.

[16] *See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. Rev. 733, 860-61 (2005); *see also* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 Va. L. & Bus. Rev. 163 (2008).

The best known of the new hybrid forms is the "benefit corporation," a new form of corporation that has been introduced in more than a dozen states.[17] A benefit corporation is a for-profit corporation whose "corporate purpose requires it to create benefit for society generally as well as shareholders." Benefit-corporation legislation makes clear that officers' and directors' fiduciary duties include "creation of public benefit and consideration of non-financial interests" and allow shareholders to enforce the company's mission.[18]

Similarly, some states have also passed legislation creating business entities known as "low profit limited liability companies" or L3Cs—"a taxable for-profit business whose primary goal is to achieve a stated social mission. Profit is a secondary goal."[19] L3Cs must satisfy three criteria: (1) they must "significantly further the accomplishment of one or more charitable or educational purposes"; (2) they must ensure that "[n]o significant purpose of the company is the production of income or the appreciation of property"; and (3) they must not be organized "to accomplish any political or legislative purposes."

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[17] *See* State by State Legislative Status, Benefit Corp Information Center, http://www.benefitcorp.net/state-by-state-legislative-status/ (last visited Jan. 24, 2014).

[18] *See id.*, Legal FAQ's, http://www.benefitcorp.net/for-attorneys/legal-faqs (last visited Jan. 24, 2014).

[19] Malika Zouhali-Worrall, *For L3C companies, profit isn't the point*, CNN MONEY (Feb. 9, 2010, 10:49 AM), http://money.cnn.com/2010/02/08/smallbusiness/l3c_low_profit_companies/.

Because the primary mission of these companies has nothing to do with earning a profit, they have been dubbed "the for-profit with a nonprofit soul."[20]

As these examples illustrate, the government's bright line between for-profit and non-profit corporations simply does not fit reality. For-profit corporations are not required to maximize profits ahead of every other goal, and not-for-profits are not precluded from seeking to maximize profits. Moreover, given the explosion of new hybrid corporate forms, the line between a for-profit corporation and a not-for-profit corporation is not even well defined. Ultimately, a corporation's ability to pursue goals other than profit—including religious, charitable, or philanthropic goals—has nothing to do with whether it adopted the for-profit or not-for-profit form. The Court should not condition free-exercise rights on such an arbitrary test.

B. For-Profit Entities May Be Formed and Operated for Religious Purposes.

Just as for-profit entities may and frequently do have charitable or philanthropic purposes, they also often have religious purposes. To some, this may seem counterintuitive—although it is obvious how a for-profit corporation can perform charitable or philanthropic acts, it may initially be less obvious how a for-profit corporation can practice religion.

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[20] Grant Williams, *Dozens of Companies Are Sprouting with the Same Goal: Doing Good*, THE CHRONICLE OF PHILANTHROPY (Nov. 12, 2009), http://philanthropy.com/article/Dozens-of-Companies-Are/57786/.

After all, a corporation cannot pray or take communion. Still, it is obvious that for-profit corporations can engage in certain religiously motivated conduct such as closing on Sunday, and to the extent that the law views a corporation as an independent person, it follows that it is the corporation itself that takes this religiously motivated action.

Nevertheless, the exercise of religion by for-profit corporations goes far beyond closing on Sundays. To see how, it helps to consider the religious beliefs of the C12 Group and its members, who view their for-profit corporations as fundamentally religious institutions and who attempt to run their corporations primarily for the glory of God.

At the heart of the C12 Group's mission is a simple belief—that Christian men and women are called to live every part of their lives for the glory of God. As a result, C12 rejects the rigid separation of faith and business advocated by the Solicitor General. Indeed, C12 believes that for Christians, "there is no sacred/secular divide,"[21] and it believes that "no other misconception has hindered and damaged the cause of Christ in modern times as much as this sort of compartmentalization." For that reason, the mission of the C12 Group is to teach and encourage Christian businessmen and women to live their whole lives—and to operate their businesses—in accordance with their Christian faith.

C12 members espouse the idea that some people are called to serve God not through full-time

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[21] Jacobs, *A Light Shines Bright in Babylon: A Handbook for Christian Owners and CEOs* at 4.

ministry in a church or through a traditional religious charity, but through a for-profit business—by owning and operating a business that glorifies God and shows God's love to others. Thus, while C12 and its members do not view their for-profit businesses as churches *per se*, they view the purpose of their businesses as analogous to the purpose of the church. As C12 founder Buck Jacobs explains in one of his books for owners and CEOs of Christian businesses:

> Your company is not a church, but its purpose is ultimately the same as that of the church. It represents your primary ministry opportunity. Your business is your platform for ministry, uniquely given to you by God to run for Him, to use for His glory and the building up and equipping of His Body. If you're called by God to run His company, your calling is as holy as that of any pastor, priest or missionary. The person placed in charge of a property belonging to the Most High God is a person given a sacred task.[22]

Consistent with this view, C12 and its members view their businesses—the vast majority of which are organized as for-profit entities—as "the leading ministry opportunity in [their] li[ves]."[23] They see the "natural conduct of business" as presenting "perhaps the greatest array of opportunities to give our testimony to the Gospel" because "it is so unusual and unexpected to hear of Christ in the marketplace."[24] Indeed, because "people expect to be

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[22] *Id.* at 1.

[23] *Id.*

[24] *Id.* at 22.

exploited or manipulated by others in the marketplace," they believe that doing business in a Christian way can serve as a powerful testimony—in some cases even more powerful than traditional forms of religious exercise such as preaching a sermon or doing charitable activities.

These beliefs strongly shape the way that C12 and its members conduct business—from the way they deal with their customers, suppliers, and employees to the way they evaluate the success of the business. For example, C12 believes that companies should treat everyone who interacts with the business in accordance with the Golden Rule, meaning, for example, that suppliers should not be "abused or taken advantage of unfairly"[25] and that "we should not unfairly play one supplier against another to their detriment."[26] Similarly, although C12 and its members inevitably experience personnel problems, their companies aim to resolve these problems in the most compassionate and loving way possible—as they believe the Bible requires. Thus, even if it becomes necessary to fire an employee, "the employee should be out-placed by management using whatever helpful tools may be available. Concern should be expressed *and demonstrated* for the employee even while acknowledging that they may no longer have a role at your firm."[27]

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[25] *Id.* at 56.

[26] *Id.*

[27] *Id.* at 55.

C12 and its members similarly believe that Biblical principles govern how they should treat their competitors. As employees, they resolve not to "gossip about competitors or say anything derogatory."[28] Rather, they aspire to follow the spirit of Proverbs 25:21, which says that "If your enemy is hungry, give him food to eat; if he is thirsty, give him water to drink."

These principles particularly apply to the relationship between a company and its CEO—one that has been the subject of a great deal of recent attention by both regulators and the media. C12 and its members believe that God requires them to set the CEO or owner's compensation *fairly* and "in proportion to the compensation of the team." Toward this end, C12 encourages even the CEOs of owner-operated companies to set their salaries through a "council of advisors, accountability group, or board compensation committee" rather than unilaterally.[29]

These religious beliefs ultimately mean that, contrary to the picture painted by the Solicitor General, C12 and the for-profit companies of many of its members do *not* aim simply to maximize profits. While C12 and its members believe that earning a legitimate profit can be perfectly compatible with living their Christian faith (and in fact, C12 members typically drastically outperform their competitors), there are also frequently situations in which they believe that God calls their companies *not* to maximize profits, and they run their businesses accordingly. A prime illustration involves what a

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[28] *Id.* at 58.

[29] *Id.* at 66.

company should do when it is inconvenient to comply with a contract. While many companies would breach the contract if they believe they can get away with doing so, C12 and its members believe that God calls them to keep their word—even when doing so is costly:

> If the company enters into a contract, it will keep it even if it hurts (Psalm 15:4b)! This doesn't mean that a Christian company cannot or will not ask to be released from an unfair or undesirable agreement. But if it is unable to obtain permission from the other party to alter or eliminate the agreement, then [it] will keep [the contract] without complaint. A Christian company's word must be good, even if unforeseen circumstances make things difficult."[30]

Not surprisingly, then, C12 and the for-profit companies of its members measure their "profitability" in terms other than monetary profitability—including the company's "reputation within the body of Christ," its "[r]eputation with the [u]nbelieving [w]orld," and its "production of eternal fruit."[31]

Of course, these views about the relationship between faith and business are not unique to C12. Indeed, there are numerous other organizations with missions similar to C12's.[32] Nor is C12's view of work

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[30] *Id.* at 65-66.

[31] *Id.* at 39-42.

[32] Other businesses include: CEO Forum (roughly 300 companies), Convene (roughly 400 members), CBMC Forums (roughly 550 members), FCCI Christ at Work

a uniquely Protestant view. As the Pontifical Council for Justice and Peace has explained, the Catholic Church believes, like C12, that "[t]he vocation of the businessperson is a genuine human and Christian calling,"[33] and that God has important things to say about how businesspeople run their businesses. Importantly, as Pople John Paul II explained, the purpose of a business "is not simply to make a profit, but is to be found in its very existence as a community of persons who in various ways are endeavouring to satisfy their basic needs, and who form a particular group at the service of the whole of society."[34] As a result, many Catholics similarly believe that business institutions—including for-profit corporations—should be run according to important religious principles that ensure that they honor God and respect "the dignity of people as ends in themselves who are intelligent, free, and social."[35] Similarly, many adherents to Judaism believe that God requires them to close on the Sabbath and

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Groups (roughly 400 members), Truth@Work (roughly 350 members), the Full Gospel Business Men's Fellowship (roughly 500 members), and Legatus (roughly 600 Catholic CEOs of businesses of all sizes).

[33] *See* Brief of Wywatch Family Action, Inc., and Eagle Forum Amici Curiae in Support of Appellants and Reversal at 19-20, *Hobby Lobby v. Sebelius*, No. 12-6294 (10th Cir. Feb. 19, 2013) (internal quotation omitted).

[34] Vocation of the Business Leader: A Reflection, Pontifical Council for Justice and Peace at 18 ¶ 57, *available at* http://www.stthomas.edu/cathstudies/cst/conferences/Logic%20of%20Gift%20Semina/Logicofgiftdoc/FinalsoftproofVocati.pdf.

[35] *Id.* at 12 ¶ 35.

conduct their businesses with honesty and integrity—and they believe that God does not distinguish between the acts of the corporation and the acts of its owner.[36]

From this exposition, it should be obvious that the Solicitor General is wrong to assert that "[f]or-profit corporations 'are different from religious non-profits in that they use labor *to make a profit*, rather than to perpetuate a religious values-based mission.'" Gov't *Hobby Lobby* Br. 19. While C12 and the companies of its members do hope to earn a profit, that goal is subsidiary to their primary purpose, which is a religious one. In other words, the fact that these companies may legally distribute profits to investors doesn't mean that they are legally obligated to maximize profits at the expense of other considerations. The purpose of these companies is not, as the Solicitor General asserts, "simply to engage in commerce." *Id.* Rather, the purpose of the company is to serve God—just as it is the purpose of a church to do so.

It follows that for-profit corporations deserve free-exercise rights every bit as much as the "religious non-profits" that the Solicitor General concedes merit this protection. Both sorts of company may be organized to "perpetuate a religious values-based mission," and free exercise for both types of entity is integral to ensuring that the government does not

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[36] Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 Geo. Mason L. Rev. 59, 68 (2013) (citing Moses L. Pava, *Developing a Religiously Grounded Business Ethics: A Jewish Perspective*, 8 Bus. Ethics Q. 65, 65 (1998)).

substantially burden "'a person's exercise of religion." 42 U.S.C. § 2000bb-1(a).

III. THE GOVERNMENT IS WRONG TO ASSERT THAT THE GREENS' RELIGIOUS VIEWS CANNOT BE IMPUTED TO HOBBY LOBBY.

The Solicitor General also makes a separate—and not wholly consistent—argument that, regardless of the nature of Hobby Lobby's corporate structure, the Green family's religious views cannot be imputed to Hobby Lobby. *See* Gov't *Hobby Lobby* Br. 23. The Solicitor General maintains that Hobby Lobby is improperly conflating the Greens' personal beliefs with its own, thereby running afoul of the "bedrock principle that a corporation is legally distinct from its owners." *Id.* at 25. The Solicitor General asserts that there is "no basis on which to impute the [Green's] religious beliefs to [Hobby Lobby]." *Id.*

This argument fails first because the Court has *already* found corporations capable of having the views of their constituents imputed to them. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525–26 (1993) (recognizing free-exercise rights of non-profit church corporation).

Setting this aside, however, the Solicitor General's assertion also places an unwarranted emphasis on a corporation's religious "beliefs" in place of its religiously-motivated acts. The language of the free-exercise clause reflects a decision to protect not only conscience, but more centrally to

protect religious acts.[37] When Hobby Lobby closes stores on Sunday, what is it doing if not taking a religious act?

Nevertheless, even if the primary issue were what a corporation "believes," the Solicitor General's argument still misses the forest for the trees. Of course corporations are "legally distinct" from their owners; but the unusual conclusion the Solicitor General draws from that fact is that the thoughts, beliefs, or actions of a corporation's owners or agents cannot be imputed to a corporation. But what could a corporation do, know, and intend if not derived from the human beings related to the corporation? To the contrary, corporations can *only* derive their acts, thoughts, and intentions from their constituents.

Courts have for well over a century analyzed the "minds" of corporations in tort and criminal law. In 1909, the Court quoted a treatise to describe the "modern" authority on whether a corporation can meet the mental state requirements to commit a crime: "'If, for example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously.'" *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 492–93 (1909) (quoting *Bishop's New Criminal Law*, § 417). More contemporary criminal

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[37] *See* McConnell, *The Origins & Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. at 1490 (also noting that "[a]s defined by dictionaries at the time of the framing, the word 'exercise' strongly connoted action.").

law cases from the circuits often perform detailed analyses of employees' and directors' thoughts and actions to determine whether a corporation knew certain information and intended to break the law. *See, e.g., United States v. Bank of New England, N.A.*, 821 F.2d 844, 854–55 (1st Cir. 1987) (upholding jury instructions on a corporation's willfulness and collective knowledge that led to conviction of defendant corporation).

Thus, to the extent that the exercise of religion requires both (1) an act and (2) an intention to act based on a religious "belief", the Court has long held that corporations may derive both from their owners or agents. To return, then, to Hobby Lobby's practice of closing stores on Sunday: If Hobby Lobby could be criminally prosecuted for, say, closing stores with the intent to obstruct justice, *see, e.g., United States v. Washington Water Power Co.*, 793 F.2d 1079, 1084 (9th Cir. 1986) (finding that defendant corporation had the mental state to obstruct justice), then Hobby Lobby surely by the same principle can close stores to follow religious precepts.[38]

Much of this Court's jurisprudence on other constitutional rights of corporations follows this same theme: that a corporation is a separate legal entity, yet still the creature of real human beings, who imbue corporations with rights and views. In

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[38] *See also* Rienzi, *God and the Profits: Is there Religious Liberty for Moneymakers?*, 21 Geo. Mason L. Rev. at 89 ("It is unclear what principled reason would justify viewing a corporation as capable of forming and acting upon criminal intentions but incapable of forming and acting upon religious ones.").

Boy Scouts of Am. v. Dale, 530 U.S. 640, 655–56 (2000), for example, the Court analyzed the free speech rights of the Boy Scouts of America with particular attention to the mechanics of how opinions of constituents were expressed through the association. *See id.* at 655 ("the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.'"); *see also Citizens United*, 558 U.S. at 349, 354 (referring to corporations with free speech rights as "associations of citizens"). Likewise, in *Barlow's*, 436 U.S. at 311, the Court accorded Fourth Amendment search and seizure rights to a corporation, noting that the Fourth Amendment was intended in large part to address the negative experience of "merchants and businessmen" who had consistently put up with unceremonious inspections of their business premises by the Crown. *See also Hale v. Henkel*, 201 U.S. 43, 76 (1906) (according Fourth Amendment rights to corporations, stating, "A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body.").

The Solicitor General cites a number of cases to support its assertion that the Greens' views cannot be imputed to Hobby Lobby, but these cases undermine rather than buttress the Solicitor General's point. Thus, the Solicitor General points out that in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001), this Court found that boxing promoter Don King and his single-shareholder corporation were sufficiently separate so

that the corporation could be an "enterprise" that King could participate in for purposes of RICO. Gov't *Hobby Lobby* Br. 23–24. But no one denies Hobby Lobby's legal separateness from the Green family. Instead, the useful analogy from that case is that, like Hobby Lobby, the affairs of the corporation in *Cedric Kushner* were conducted by its shareholder and employee, Don King. *Cedric Kushner*, 533 U.S. at 166 ("The alternative that we endorse ... does not deny that a corporation acts through its employees; it says only that the corporation and its employees are not legally identical."). Thus, Don King's acts and intentions were imputable to the corporation that he owned and controlled. The same is true for *Schenley Distillers Corp. v. United States*, 326 U.S. 432 (1946) and *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006), both cases in which the Court pointed out the distinct rights and obligations of corporations, but also illustrated that corporations only act through employees and owners.

This specific issue is particularly relevant to C12's members, who represent more than a thousand closely held faith-based businesses. The women and men who own and run these businesses place their religious faith before all other considerations—profit, prestige, or power—in business management. And the corporations associated with these businesses in turn reflect this orientation. In many instances, this approach in fact serves to increase profits by, among other things, engendering greater levels of trust and loyalty with all stakeholders (*i.e.*, employees, customers, suppliers, investors). But importantly, when additional profit conflicts with religious views, these corporations consistently follow their owners' and employees' faith, and forego profits in favor of

religion. To suggest that such corporations are so divorced from their human constituents that they are *not* exercising religion in this context makes little sense—both as an analytical matter and as a matter of public policy.

In the final footnote at the close of the Solicitor General's argument about this topic, the Solicitor General appears to nod to this reality, arguing suddenly that if corporations can derive their exercise of religion from owners and agents, this would create "significant RFRA-created gaps in employment regulation," because privately held corporations make up a large part of the American economy. Gov't *Hobby Lobby* Br. 26 n.7. The Solicitor General's point, however, should influence the Court in the other direction. The prevalence of privately held corporations in the economy means that the number of corporations that put religious views above profits is significant, as is the potential burden placed on these corporations by denying their free-exercise rights. Indeed, the practical effect of a finding that corporations cannot exercise religion may well be that many of the business leaders and owners who are part of C12 will find that their consciences do not allow them to continue to own and lead businesses. And in most cases, this means that the businesses they own and run will no longer exist.

The Court should not let this happen. Nor should the Court rely on the Solicitor General's artificial description of for-profit corporations to deny protection under RFRA and the free exercise clause. Instead, the Court should recognize that the corporations owned and run by the likes of C12's

members exercise religion in a very real way, and that the right to do so should be protected.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Tenth Circuit should be affirmed, and the judgment of the U.S. Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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